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II. FINDINGS OF FACT

2.1 Appellant Jay Herzmark is an Industrial Hygienist II and a permanent employee of Respondent University of Washington (UW) in the Department of Environmental Health and Safety. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on January 12, 2000.

2.2 The Department of Environmental Health and Safety (EHS) is located in the Hall Health Center. As an Industrial Hygienist, Appellant was assigned to the Occupational Health and Safety Office. He was responsible for the areas of Respiratory Protection, Confined Space, Lock Out/Tag Out, and Personnel Protective Equipment. In addition, Appellant was responsible for conducting training in these areas. Appellant was not responsible for conducting occupational safety surveys as a part of his regular assignments. However, other employees of the Occupational Health and Safety Office were responsible for conducting occupational safety surveys.

2.3 At the time of the action giving rise to this appeal, Appellant was a shop steward for the Washington Federation of State Employees, AFSCME, AFL/CIO, Local 1488, within the campus-wide bargaining unit and under the collective bargaining agreement adopted therein.

2.4 Appellant's employment history includes a number of counselings regarding his obligation to separate his role of union shop steward from his role as a UW employee. By letter dated December 14, 1998, Kim Jones, Environmental Health Officer, provided Appellant with his job responsibilities and expectations. Mr. Jones confirmed that conducting occupational health surveys was not one of Appellant's responsibilities. Mr. Jones directed Appellant to report observed deficiencies or problems falling outside of the sphere of his responsibilities to the appropriate staff. Mr. Jones also told Appellant that general union activities should be restricted to non-work time,

1 non-work locations and the use of non-work resources, and that if he was to perform union shop
2 steward activities during work hours, he was to submit a request for time off.

3 2.5 By memorandum dated April 19, 1999, Mr. Jones informed Appellant that he was not
4 concerned with Appellant serving as a union shop steward as long as he clearly separated his union
5 activities from his assigned work responsibilities. Mr. Jones also told Appellant that he needed to
6 obtain permission to take time off for handling union business during work hours and that if he
7 wished to conduct union business during his breaks, they would schedule regularly recurring break
8 periods to avoid confusion and concern.

9
10 2.6 Appellant is an excepted work-week employee and as such does not have regularly
11 scheduled breaks or a regularly scheduled lunch period. Appellant credibly testified that he took
12 breaks and lunch as his work assignments permitted.

13
14 2.7 Hall Health Primary Care Center (HHPPC) is also located in the Hall Health Center. In an
15 effort to advance unified patient care for clients, Respondent determined that clinic registration staff
16 for HHPPC, should be moved to a central location. In early 1999, a remodeling project began and
17 on July 6, 1999, the new registration area was opened. The remodeling project continued through
18 the remainder of 1999 with further changes occurring in 2000. Throughout the project, Respondent
19 was attempting to address staff concerns and complaints.

20 2.8 In the fall of 1999, clinic registration staff raised safety concerns about the registration area
21 to Stephanie Morgan, Classified Staff Association (CSA) 925 shop steward. Ms. Morgan contacted
22 Appellant and asked him to perform an informal study of the area. Ms. Morgan knew Appellant was
23 a union shop steward for the Washington Federation of State Employees and she approached him
24 for assistance as a fellow union activist. In addition, the employees of the Hall Health Center knew
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1 Appellant and knew that he worked in the Occupational Health and Safety Office. Appellant agreed
2 to conduct an occupational health survey of the Hall Health Center reception area.

3 2.9 At approximately 2:30 p.m. on October 19, 1999, Appellant was in the registration area
4 performing the survey. While he was there, Barbara Howe, HHPPC Associate Director,
5 approached him. She asked him what he was doing in the area and he said that he was conducting
6 an ergonomics evaluation. No one had asked or told Ms. Howe that such an evaluation was to be
7 conducted. She thought it was unusual and she notified Dr. Elaine Jong, the Director of HHPPC, of
8 her encounter with Appellant. Ms. Howe and other HHPPC staff knew that Appellant worked for
9 the Occupational Health Safety Office. However, while he was conducting the survey, Appellant
10 did not tell Ms. Howe or any other HHPPC staff that he was performing union business.

11
12 2.10 In his answers to Respondent's interrogatories, Appellant stated that he was acting at the
13 direction of the EHS director during his conversation with Ms. Howe. He also stated that he took
14 no steps to inform management that he was acting as a union representative rather than as a
15 University employee when he inspected the HHPPC on October 19.

16
17 2.11 After concluding his survey, Appellant provided Ms. Morgan with a memorandum listing
18 the problems he found in the clinic registration area. By letter dated November 12, 1999, Ms.
19 Morgan provided Appellant's memorandum as an attachment to a letter that she sent to Dr. Jong.
20 The memorandum identified Appellant as Industrial Hygienist, AFSCME 1488.

21 2.12 By letter dated January 6, 2000, Kelli Trosvig, Director of Budget and Administration for
22 Health Sciences Administration, notified Appellant of his five-day suspension effective January 10,
23 2000. Ms. Trosvig stated that the circumstances that made the action necessary were summarized
24 in a memorandum from Kim Jones with the concurrence of Karen VanDusen.

1 2.13 By memorandum dated December 17, 1999, Mr. Jones stated that Appellant's actions were
2 of grave concern because he did not seek or obtain approval to conduct an occupation health survey
3 at HHPPC; during the survey, he did not identify himself as acting as an independent consultant
4 representing CSA 925; and because the survey he completed fell within the normal course of his
5 duties. Mr. Jones further stated that Appellant's actions undermined the University's commitment
6 to health and safety, interfered with the conduct of business by the Environmental Health and Safety
7 department, and violated University policy outlining the Washington Ethics in Public Service Act.

8
9 2.14 In relevant part, University Operations Manual D 47.3 and the University Handbook permit
10 an employee to engage in outside consulting work provided the work is:

11 D47.3(2): Neither within the normal course of the employee's official University
12 duties nor under the employee's supervision.

13

14 Does not involve assisting others in transactions with the University in which the
15 employee has participated or which has been under his or her official responsibility.

16

17 D47.3 (3a): While the state of Washington Ethics in Public Service Act permits
18 outside work, University professional and classified staff must secure advance
19 review and approval of outside work whether or not for compensation whenever
20 such activities stem from, could conflict with, or relate to the individual's official
21 duties or status as a University employee. . . .

22 D47.3 (3b): Outside consulting or part-time employment covered by the review
23 requirements identified in Section 3.a must be approved in advance. . . .

24 D47.3 (5): Employees who engage in outside consulting or part-time employment
25 must clearly identify that they are doing so as independent professionals and not as
26 representatives of the University of Washington and that such undertakings are
outside of their University responsibilities. . . .

27 2.15 Appellant was aware of University policies and procedures regarding outside consulting
28 work.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant engaged in misconduct similar to that for which he was previously counseled. Respondent contends that Appellant committed misconduct when he failed to bring the safety violations he found in the HHPPC reception area to his supervisor's attention, failed to inform the person in charge of the reception area that he was acting in a union capacity, and failed to seek approval from his supervisor prior to conducting union business during work time. Respondent asserts that Appellant's actions were in violation of University policy and the Washington Ethics in Public Service Act. Respondent contends that the five-day suspension was the minimum suspension allowed for an excepted work-week employee and that the sanction was appropriate in this case especially since Appellant's misconduct was similar to his prior misconduct.

3.2 Appellant argues that he conducted the survey during his non-work time lunch period to help out his co-workers. Appellant agrees that he has a duty to do his job and to follow the lawful directives of his employer. He also states that he has a duty as a shop steward to do a good job and a right to engage in concerted effort with co-workers to address issues of common concern. Appellant contends that he used his expertise and skills to assist co-workers with a working condition issue, that he reported the information appropriately, and that he received nothing of economic value for his report. Furthermore, Appellant argues that Dr. Jong was appreciative of his report. Appellant asserts that the sanction imposed is unwarranted and that his appeal should be granted.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

1 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
2 the charges upon which the action was initiated by proving by a preponderance of the credible
3 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
4 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
5 Corrections, PAB No. D82-084 (1983).

6
7 4.3 Respondent has met its burden of proof that Appellant engaged in misconduct. Appellant
8 failed to comply with the lawful directives of his supervisor and failed to clearly separate his union
9 activities from his duties and responsibilities as a University employee. While Appellant should not
10 be required to seek permission to conduct union business, he is obligated to inform his supervisor
11 when he is conducting bargaining unit business during work hours and to clearly identify to
12 University staff when he is conducting bargaining unit or general union business. Appellant was
13 clearly made aware of these obligations through the directives of his supervisor.

14 4.4 Respondent has failed to prove that Appellant failed to abide by University policy.

15
16 4.5 In determining whether a sanction imposed is appropriate, consideration must be given to
17 the facts and circumstances including the seriousness and circumstances of the offense. The penalty
18 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent
19 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.
20 An action does not necessarily fail if one charge is not sustained unless the entire action depends on
21 the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

22 4.6 Under the proven facts and circumstances of this case, Respondent has shown that a
23 suspension is warranted, however, a five-day suspension is too severe. A suspension equivalent to
24 16 hours of pay should be sufficient to prevent recurrence, to deter others from similar misconduct,
25 and to maintain the integrity of the program. Although we have concluded that a five-day
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1 suspension is too severe, Appellant must understand that if he is on University property, performing
2 work typically performed by the EHS department, he is assumed to be acting as a University
3 employee unless he clearly notifies the appropriate individuals, including his supervisor, that he is
4 acting in his capacity as a union shop steward. Under the proven facts and circumstances and
5 because of the recurring nature of Appellant's misconduct, a 16-hour suspension is appropriate and
6 the appeal should be denied.

7
8 **V. ORDER**

9 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Jay Herzmark granted in part
10 and the disciplinary sanction is modified to a 16-hour suspension without pay.

11 DATED this _____ day of _____ 2000.

12 WASHINGTON STATE PERSONNEL APPEALS BOARD

13
14 _____
Walter T. Hubbard, Chair

15
16 _____
Gerald L. Morgen, Vice Chair

17
18 _____
Leana D. Lamb, Member

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25
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Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504